

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MIKE KREIDLER, Insurance Commissioner for  
the State of Washington and as Receiver for  
Cascade National Insurance Company, in  
Liquidation,

Plaintiff,

v.

DANNY L. PIXLER and ROXANN PIXLER,  
individually and their marital community;  
ANTHONY HUFF and SHERI HUFF,  
individually and their marital community;  
AMERICAN STAFF RESOURCES OF  
CALIFORNIA, INC., a Delaware corporation;  
CERTIFIED SERVICES, INC., a Nevada  
corporation; MIDWEST MERGER  
MANAGEMENT, LLC, a Kentucky Limited  
Liability Company; and JOHN DOES 1 – 10,

Defendants.

NO. C06-697 RSL

PLAINTIFF'S REPLY TO  
DEFENDANTS' RESPONSE TO  
PLAINTIFF'S MOTION FOR ORDER RE  
DISCOVERY PLAN

**NOTED FOR MOTION CALENDAR:  
July 20, 2007**

Plaintiff submits this Reply to Defendants' Response to Plaintiff's Motion for Order  
Establishing a Discovery Plan.

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1 Defendants' Response indicates they do not object to the Court establishing a  
 2 discovery plan. Plaintiff's proposed discovery plan with its proposed dates and deadlines is  
 3 reasonable and realistic. It is also in keeping with the parties' original agreed-upon plan  
 4 arising in their discovery conference on April 26, 2007, in which the case deadlines were  
 5 discussed and considered in coming to the agreements which were reached. Plaintiff's  
 6 proposed discovery plan is also realistic given the expert report deadline of March 12, 2008,  
 7 the discovery cutoff of May 11, 2008, and the trial date of September 8, 2008.

8  
 9 In order to avoid unnecessary costs and attorneys' fees in discovery scheduling arising  
 10 from the unilateral noting of depositions, and to keep this case on track, plaintiff filed this  
 11 motion with a proposed plan that is deliberate, organized and cost-effective.<sup>1</sup> To date,  
 12 plaintiff has been operating in such a deliberate and concerted fashion, and has cooperatively  
 13 and timely produced documents, responded to discovery, and kept defendants fully informed  
 14 of the status of production. (See for example, letters to defense counsel dated June 20, 2007,  
 15 and July 17, 2007, attached to the *Supplemental Declaration of Victoria L. Vreeland*  
 16 submitted herewith.)

17  
 18 Defendants complain that the depositions should start in early August; plaintiff  
 19 believes it is more realistic that they commence at the earliest in late August, given the actual  
 20 status of production and discovery. This is because all the principal documents have not yet  
 21 been fully produced: (1) defendants have only produced to date a half-size box of records, and  
 22 the comprehensive discovery requests to defendants are due July 25<sup>th</sup>; (2) plaintiff has been  
 23 gathering, preparing and producing voluminous documents to defendants; yet there are many  
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25  
 26 <sup>1</sup> Plaintiff did confer with defense with regard to a discovery plan prior to filing this motion, assuming such a  
 conference is required; and had developed one cooperatively with defense arising from the April 26, 2007,  
 conference.

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1 more to produce;<sup>2</sup> and (3) the regulatory documents in the Office of Insurance Commissioner,  
 2 which are separate from those records in the possession of the Commissioner *as Receiver* of  
 3 Cascade National, have been or are in the process of being produced.<sup>3</sup>

4 The parties had agreed in the April 26<sup>th</sup> conference that depositions would not  
 5 commence, and would be mutually and cooperatively scheduled, after the documents were  
 6 produced. Holding the depositions after realistic production dates, as plaintiff's plan  
 7 proposes, is imminently reasonable and cost-effective.

8 As regards a deposition of Insurance Commissioner Mike Kreidler, plaintiff has  
 9 previously advised defendants of the issues about noting up a deposition of a public official,  
 10 and suggested to defense that other depositions be taken and then defense can determine if it  
 11 needs or wants to depose the Commissioner and the parties could then address it, or bring it to  
 12 the Court. Instead, defendants unilaterally noted up the Commissioner's deposition.  
 13

14 Plaintiff will, if necessary, file a Motion for Protective Order on this issue.<sup>4</sup> However,  
 15 plaintiff's proposed discovery plan would avoid the costs and expenses of such a motion at  
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 18 <sup>2</sup> Given the expenses involved, plaintiff cannot assume that defense will reimburse the cost for production by  
 CD, and plaintiff has requested written confirmation from defense. An email response from defense would  
 suffice.

19 <sup>3</sup> Defendants complain that plaintiff required a Subpoena Duces Tecum for the records of the Insurance  
 20 Commissioner, and suggest that plaintiff has been "intransigent" in discovery. Plaintiff advised defendants early  
 on that the records they desired from the Commissioner's office would be produced, cooperatively through  
 plaintiff's counsel in this case; however, a SDT would be necessary given the separate regulatory functions of  
 that Office. Plaintiff assisted defendants in drafting the SDT, accepted service, and have coordinated getting the  
 21 records to produce to defendants. This process avoided motions practice before the Court, with potential  
 appearances by the State Attorney General for Washington to request that a SDT be issued. Contrary to  
 22 defendants' characterizations, plaintiff has been helpful and forthcoming in assisting in timely discovery by  
 defendants from the Office of Insurance Commissioner.

23 <sup>4</sup> There is well-established case law on this issue. An agency head is generally not subject to deposition. See,  
 24 e.g. Kyle Engineering Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979) (heads of government agencies generally  
 not subject to deposition); Peoples v. United States Dep't of Agriculture, 427 F.2d 561, 567 (D.C. Cir. 1970)  
 (court has discretion to insure discovery process will not unduly burden government officials); Church of  
 25 Scientology of Boston v. I.R.S., 138 F.R.D. 9, 12 (D. Mass. 1990). The agency head must be allowed the  
 freedom to carry out their duties without being burdened by the interference of the discovery process. United  
 26 States v. Miracle Recreation Equip. Co., 118 F.R.D. 100, 104 (S.D. Iowa. 1987). Subjecting an agency head to  
 depositions divert attention from their official duties and functions. Capitol Vending Co. v. Baker, 36 F.R.D.  
 45, 46 (D.D.C. 1964). This is especially true when the information sought from the agency head is available

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1 this time while still providing discovery to defendants without any prejudice of their rights.  
 2 Plaintiff's proposals to defense were reasonable and would eliminate unnecessary time, delay,  
 3 and attorneys' fees, as well as court time.

4 Plaintiff's proposed Discovery Plan is reasonable and realistic, provides full discovery  
 5 opportunity to the parties and adequate time to conclude necessary discovery prior to the case  
 6 schedule deadlines. It does not prejudice the rights of defendants at all, but facilitates  
 7 organized and efficient discovery. It also eliminates unnecessary costs and expenses, which is  
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 13 from another source. ABC, Inc. v. United States Info. Agency, 599 F. Supp. 765, 769 (D.D.C. 1984);  
 14 Community Federal Savings & Loan Ass'n v. Federal Home Loan Bank Bd., 96 F.R.D. 619, 621 (D.D.C. 1983).  
 15 Here, the information sought is available from the Deputy Receiver, Marshall McGinnis, and other regulators  
 within the Office of Insurance Commissioner who were personally involved in the matters.

16 Ordinarily, a party seeking to preclude the deposition of a witness must show good cause. Martin v. Valley Nat.  
 17 Bank of Arizona, 140 F.R.D. 291, 314 (S.D. N.Y. 1991). With respect to a high-level government official,  
 18 however, the party seeking the deposition must show "that the deposition is necessary in order to obtain relevant  
 19 information and that it would not significantly interfere with the ability of the official to carry out his  
 20 governmental responsibilities." Id. (citations omitted). Moreover, depositions of top government officials may  
 21 only be permitted upon a showing that the official possesses relevant, first-hand knowledge of matters that may  
 not be available from other sources. See ABC, Inc., 599 F. Supp. at 769; Community Federal Savings & Loan  
Ass'n, 96 F.R.D. at 621. Further, the party seeking to depose top agency officials must show "that the  
 information they seek is not available from depositions of other defendants or persons, or that it cannot be  
 obtained through interrogatories or other discovery devices." Cornejo v. Landon, 524 F. Supp. 118, 122 (N.D.  
 Ill. 1981). Here, the defendants would need to show that the Commissioner has relevant, first-hand knowledge  
 of matters and that they cannot obtain the information they seek through the depositions of lower ranking  
 officials or other discovery devices.

22 The immunity high government officials enjoy from depositions "is justified on the grounds that such officials  
 23 must be allowed the freedom to perform their duties without the constant interference of the discovery process."  
 24 United States v. Miracle Recreation Equip. Co., 118 F.R.D. 100, 104 (S.D. Iowa. 1987). Such depositions  
 25 divert heads of government agencies from spending time on their official functions. Capitol Vending Co. v.  
Baker, 36 F.R.D. 45, 46 (D.D.C. 1964). "It would be oppressive and vexatious to require [heads of government  
 26 agencies] to submit to an interrogation that might last several hours and that would, of course, disturb  
 government business." Id. Accordingly, it is generally the rule "to relieve agency decision-makers from the  
 burdensomeness of discovery [and] to allow them to spend their valuable time on the performance of official  
 functions." Cornejo, 524 F. Supp. at 122.

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1 of particular importance in this case given the location of witnesses and records and the public  
2 nature of this action.

3 Dated this 20th day of July, 2007.

4  
5 GORDON, THOMAS, HONEYWELL,  
6 MALANCA, PETERSON & DAHEIM LLP

7 By: /s/  
8 Victoria L. Vreeland, WSBA No. 08046  
9 Donald S. Cohen, WSBA No. 12480  
10 Daniel S. Potts, WSBA No. 32866  
11 Attorneys for Plaintiff  
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that on July 20, 2007, I electronically filed the following: (1) Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Order Establishing a Discovery Plan; (2) Supplemental Declaration of Victoria L. Vreeland in Support of Plaintiff's Motion for Order Establishing a Discovery Plan; with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 20th day of July, 2007.

s/Kristin A. Larkin  
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